

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET P. LORDE

v.

CITY OF PHILADELPHIA

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CIVIL ACTION
No. 98-5267

O'Neill, J.

November , 2000

MEMORANDUM

Presently before me is defendant's motion for summary judgment. For the reasons stated below, the motion will be granted.

BACKGROUND

Plaintiff Margaret Lorde began working in the City of Philadelphia's District Attorney's office in 1969. In July 1994, she was diagnosed with carpal tunnel syndrome. At first, her healthcare provider recommended modified work duties to accommodate her condition, and the D.A.'s office apparently abided by that recommendation. However, as of September 20, 1994, plaintiff's personal physician diagnosed her as being "totally disabled." See Letter from Dr. Montique dated September 20, 1994 (Defendant's Ex. 17). Thereafter, plaintiff did not return to work. After expending her accumulated sick and vacation time, as well as leave time under the City's civil service rules and the federal Family and Medical Leave Act, plaintiff was dismissed from her position on September 3, 1996.

Plaintiff applied for Social Security Disability Income (SSDI) benefits in January 1996, was eventually awarded benefits retroactive to September 1994, and continues to receive those benefits to the present time.

Plaintiff filed this suit under the Americans with Disabilities Act on October 5, 1998. Defendant's motion for summary judgment argues that: 1) plaintiff is judicially estopped from claiming that she is a qualified person with a disability under the ADA because of representations made during the course of her SSDI proceedings; and, in the alternative, 2) plaintiff cannot make out a prima facie case of discrimination under the ADA because she was not a "qualified person with a disability." Because I agree that judicial estoppel applies in this case, I need not address the second argument.

DISCUSSION

Judicial estoppel is a judge-made doctrine that "seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding." Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 (3d Cir. 1995). It is designed to prevent litigants from "playing fast and loose with the courts." Id., quoting Scarano v. Central R. Co. of New Jersey, 203 F.2d 510, 513 (3d Cir. 1953). "The basic principle . . . is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4477 (1981).

Such inconsistencies can potentially arise in ADA litigation where the plaintiff has

previously applied for and received SSDI benefits. The SSDI program provides benefits to a person “under a disability” if “his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” 42 U.S.C. § 423(d)(2)(A). The ADA prohibits discrimination against a “qualified individual with a disability,” i.e., “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). The potential for inconsistency arises where, as here, a plaintiff applies for and receives SSDI benefits under the theory that she is totally disabled and therefore unable to work yet subsequently sues her former employer under the ADA alleging that she could have worked but for some discriminatory act or policy.

The Court of Appeals became one of the first courts to confront this issue in McNemar v. Disney Store, Inc., 91 F.3d 610 (3d Cir. 1996). The McNemar Court found that SSDI and ADA claims were inconsistent in a way that could not be reconciled and therefore ruled that judicial estoppel bars such claims. However, McNemar quickly came under serious criticism from other courts, the EEOC, and academia. See Krouse v. American Sterilizer Co., 126 F.3d 494, 502 n.3 (3d Cir. 1997) (discussing authorities critical of McNemar). Subsequent courts rejected the McNemar analysis. See, e.g., Rascon v. U.S. West Communications, Inc., 143 F.3d 1324, 1332 (10th Cir. 1998); Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376, 382 (6th Cir. 1998).¹

¹ The Court of Appeals has since explained that “[m]uch of the criticism is based on the mistaken belief that McNemar announced a per se rule that a claim for disability, based on an assertion of a total disability or inability to work, necessarily bars an individual from pursuing an

The Supreme Court addressed this apparent split in Cleveland v. Policy Mgmt. Corp., 526 U.S. 795 (1999). The Court held that there is no “inherent conflict” between the two statutes because a claim of disability under SSDI does not take into account the possibility of reasonable accommodation, but the ADA does require reasonable accommodation. Id. at 802-03. In other words, an individual could be disabled for the purposes of SSDI but be capable of performing a job with reasonable accommodations and therefore also be protected by the ADA. Rather than adopting a per se rule or presumption against allowing SSDI beneficiaries to bring ADA claims, the Court ruled that such plaintiffs should be given an opportunity to “proffer a sufficient explanation” for the apparent contradiction. Id. at 806.

However, the Court emphasized that it was dealing with a “representation of total disability” under SSDI, i.e., the general claim of disability that is inherently made whenever an individual applies for SSDI benefits. Id. at 802. The Court was not dealing with “directly conflicting statements about purely factual matters, such as ‘The light was red/green,’ or ‘I can/cannot raise my arm above my head’.” Id. At three different points, the Court made clear that its decision did not change the law of judicial estoppel as it applied to such purely factual contradictions. Id. at 802, 805 & 807. For this reason, the Court of Appeals has stated that even after Cleveland some ADA claims will be precluded by prior SSDI claims:

As the Supreme Court made clear in Cleveland . . . the mere fact that the statutory standards differ in some aspects does not mean that a prior assertion of permanent and total disability can never preclude a party from bringing a claim under the ADA . . . There may be cases where, looking at the previous facts and statements by a party, the assertions are such that the party cannot prove that he was a qualified individual because his previous statements take the position that he

ADA discrimination claim. McNemar announced no such per se rule.” Motley v. New Jersey State Police, 196 F.3d 160, 163 (3d Cir. 1999).

could not perform the essential functions of the job, with or without accommodation. Motley v. New Jersey State Police, 196 F.3d 160, 167 (3d Cir. 1999).

This is such a case. Plaintiff argues that she was a qualified individual because she could have performed the job of Clerk Stenographer III if she had been accommodated by limiting her typing to a maximum of two hours per day.² However, when she applied for SSDI benefits she made a series of specific factual assertions that contradict this claim. For example, in a Disability Report on January 2, 1996, plaintiff stated that “any repetitive wrist, finger, arm and repetitive position of neck would present pain, swelling, cramping and paralysis effect.” See Defendant’s Ex. 22b. Similarly, in a Request for Reconsideration dated March 18, 1996 she stated: “My major restriction, medically, according to four members of the medical profession, including two orthopedics, documented, is ‘no typing; no keyboarding of any type; no repetitive finger movement’ . . . I have been unable to perform such duties (full time) since July, 1994 and at all since August 26, 1994.” See Defendant’s Ex. 22e. In other words, where she previously represented to the SSA that she could perform “no typing . . . at all,” she now represents in this litigation that she could have typed for two hours per day. The law of judicial estoppel, even after Cleveland, provides that she should not benefit from this later, inconsistent representation.

Plaintiff makes three arguments in response to this conclusion. First, plaintiff argues that her April 26, 1996 Reconsideration Disability Report disclosed to the SSA that she was able to perform some typing. Therefore, she argues, her SSDI application is consistent with the two-hour typing limitation that is now part of her prima facie ADA claim. However, the document in

² I take no position as to whether this suggested accommodation is a reasonable accommodation under the ADA.

question cannot reasonably be so construed. It describes her physical limitations as: “No repetitive wrist/arm/hand activity. No repetitive typing. No constant walking, sitting, standing.” See Defendant’s Ex. 22f. Plaintiff argues that the phrase “no repetitive typing” meant, by implication, that she could perform some typing. Under plaintiff’s theory, the SSA should therefore have known that she could perform two hours of typing per day and should have taken this fact into account in judging whether she was able to perform her previous work or “engage in any other kind of substantial work which exists in the national economy.” Cf. 42 U.S.C. § 423(d)(2)(A). It is unlikely that the SSA would have gleaned such insight from the word “repetitive,” particularly given that she had previously stated that she could perform “no typing; no keyboarding of any type; no repetitive finger movement . . . at all since August 26, 1994.” See Defendant’s Ex. 22e.

Second, plaintiff argues that the contradictory statements in the SSDI proceedings should not be attributed to her, but rather to her doctors. See Plaintiff’s Brief at 13 (“With the exception of the generic statements Mrs. Lorde made in the original, type-written application, each and every one of the other referenced statements are not Mrs. Lorde’s personal representations of her work abilities. Rather, these statements merely express Mrs. Lorde’s view of her medical doctors’ restrictions.”). However, cases applying judicial estoppel in SSDI/ADA cases routinely hold plaintiffs accountable for statement made directly by their physicians to the SSA. See, e.g., Feldman v. Am. Memorial Life Ins. Co., 196 F.3d 783, 791 (7th Cir. 1999) (applying judicial estoppel to statements made by “employees and/or their physicians” during the course of SSDI proceedings); Smith v. Lindenmeyr Paper Co., No. 95-3973, 1997 WL 312077, at *4 (E.D. Pa. June 4, 1997) (applying judicial estoppel where plaintiff did not expressly state under oath in

prior proceeding that she was disabled but instead relied upon evidence of disability from her physicians and never “renounced the conclusions made her physicians”). Plaintiff has not “renounced” her earlier recitation of her doctors’ conclusion that she could not type “at all.” See Defendant’s Ex. 22e. Indeed, because she continues to receive SSDI, she benefits from that earlier representation to this day.

Finally, plaintiff argues that judicial estoppel should not apply because she has not acted in bad faith. However, because of the inability to reconcile these contradictions, “[i]t is difficult to get around the conclusion that, in at least one of the fora, [plaintiff] was not completely honest.” Motley, 196 F.3d at 166. This is sufficient to support a finding of bad faith for the purposes of applying judicial estoppel. Id.

An appropriate Order follows.

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ORDER

AND NOW, this day of November, 2000 after consideration of defendant's motion for summary judgment, and plaintiff's response thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that the motion is GRANTED and summary judgment is entered in favor of defendant City of Philadelphia and against plaintiff Margaret Lorde on all counts.

THOMAS N. O'NEILL, JR., J.